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HAROLD B. WILLEY, Cle

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 759.

JOE McMULLANS, *et al.*,
Petitioners,

vs.

KANSAS, OKLAHOMA & GULF RAILWAY COMPANY, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the District Court is reported in 129 F. Supp. 157, and printed in the petition for certiorari at appendix B, pp. 18, *et seq.*

The opinion of the Court of Appeals is published in 229 F. 2d 50, and is printed in the petition for certiorari at appendix B, pp. 23, *et seq.*

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether a railway company and the duly certified bargaining representative of the class or craft of locomotive engineers of the company may enter into a valid collective bargaining agreement for the compulsory retirement of such engineers at the age of 70 years.

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2. Whether a railway company and the bargaining representative elected under the provisions of the Railway Labor Act, is required to give notice to the railroad employees represented, and an opportunity to be heard, before such bargaining representative enters into an agreement with the railway company, which agreement results in the retirement of such employees on reaching the age of 70.

STATUTES INVOLVED.

45 U. S. C. Section 152, First,
45 U. S. C. Section 152, Second,
45 U. S. C. Section 152, Third,
45 U. S. C. Section 152, Fourth,
45 U. S. C. Section 152, Seventh,
45 U. S. C. Section 156,
45 U. S. C. Section 228b(a),
45 U. S. C. Section 228b sub-par. 4,
5 U. S. C. Section 715(a).

STATEMENT OF THE CASE.

To avoid confusion arising from the similarity of the names of the two labor organizations involved and the craft of employees involved, namely, the craft of locomotive engineers, the latter will be referred to as "the craft"; the respondent Brotherhood of Locomoive Firemen and Engineman as "BLF&E," and the Brotherhood of Locomotive Engineers as "BLE."

The craft is made up of all locomotive engineers operating locomotives on the respondent railroad. They are all members of either the BLF&E or the BLE. Prior to December 21, 1953, BLE was the duly certified bargaining representative of the craft (Tr. 37, 77, 8, 127). An election held by the National Mediation Board on December

21, 1953, resulted in the BLF&E being certified as representative (Tr. 142).

The railroad and BLE had negotiated the basic agreement governing the craft on March 1, 1925 (Tr. 135-140). Among other things it dealt with discipline, discharge, and seniority (Tr. 78). From that date the railroad had negotiated all changes and supplements to the basic agreement with BLE as the bargaining representative of the craft (Tr. 77, 85). After the receipt of the certification following the election on December 21, 1953, the railroad negotiated all such changes in or supplements to the basic agreement with BLF&E (Tr. 77). Between that date and the 28th of June, 1954, 14 supplementary agreements were negotiated with BLF&E affecting all phases of the field covered by the basic agreement (Tr. 81). During the entire time from the negotiation of the basic agreement in 1925 to the supplement in controversy herein the railroad at all times recognized the duly certified bargaining representative, whether it was BLE or BLF&E (Tr. 75). The railroad at no time gave notice to the individual members of the craft and never negotiated any change, supplement or modification of the agreement with any individual member of the craft (Tr. 78, 79, 81, 82, 85). The railroad never required either labor organization in its capacity as bargaining representative to furnish proof of notice to members of the craft of any proposed negotiations (Tr. 82, 83). The railroad was not advised by either labor organization of the means by which proposed changes in the agreement were formulated or decided upon by the bargaining representative (Tr. 79).

A 70-year compulsory retirement plan had been talked about for a long time (Tr. 79). The bargaining representative began discussing it with the railroad the latter part of February or early in March, 1954 (Tr. 80). There

was the usual discussion up and down the railroad by the men in the different crafts regarding 70-year retirement proposal, and several members of the craft, who were members of BLE, sought to protest the proposition with a retired executive officer of the railroad about two months before the agreement was negotiated. Petitioner McMullans and the president of BLE Lodge called upon the president of the railroad June 25, 1954, to protest the adoption of such a retirement agreement (Tr. 41, 59, 68, 81, 90, 95, 102, 111).

On June 28, 1954, the bargaining representative entered into the retirement agreement with the railroad (Tr. 80, 81, 83). This agreement became effective July 1, 1954, but no action was taken toward requiring retirement by those affected until October 31, 1954 (Tr. 133). Copy of this agreement was mailed July 1, 1954, by the railroad to each member of the craft, including petitioners (Tr. 47, 59, 62).

When BLE was the bargaining representative for the craft it never gave notice of proposed negotiations of agreements or supplement thereof to the craft, nor were members of the craft who did not belong to BLE admitted to its lodge meetings (Tr. 112). It has never been the custom or practice in the railroad industry for the bargaining representative to consult the members of the craft individually or collectively with respect to actions taken regarding the making of agreements (Tr. 121). From the execution of the agreement in 1925 the railroad had sent copies of all changes or supplements to each member of the craft (Tr. 56, 63). Members of BLE can become members of BLF&E if they so desire (Tr. 119, 121).

Petitioner McMullans and Edwards were members of BLE (Tr. 58, 61), while Pate had withdrawn from it in January, 1953, and joined BLF&E because he thought

it would best represent him, and he was a member of BLF&E at the time this agreement was made (Tr. 53).

The railroad officers had seen a number of agreements between railroads and various employee organizations for compulsory retirement at age 70 (Tr. 79). BLF&E and the Brotherhood of Railroad Trainmen had some 28 agreements for the compulsory retirement of crafts represented by them at age 70, and one at age 68 (Tr. 123). On one railroad BLE and BLF&E had a joint agreement for compulsory retirement at age 70 (Tr. 124).

Petitioner Pate, while a member of the craft and BLF&E, was not present at the lodge meeting on the date it approved the 70-year-retirement agreement, but was present at the regular meeting on July 25th following (Tr. 94). At that meeting he made a motion that the agreement for retirement at age 70 be held in abeyance and that the age of retirement be made 65 instead (Tr. 94). This motion was not adopted (Tr. 94). The General Chairman of BLE with the Vice Chairman, also a fireman and not a craft member, circulated a letter among the firemen seeking a new election to remove BLF&E as bargaining representative of the firemen and substitute BLE (Tr. 42, 43, 140). However, in their complaint against the BLF&E as to such representative, the letter says: "The Engineers Lodge will not make any effort to do away with the 70-year retirement agreement" (Tr. 140).

In negotiating agreements or supplements to existing agreements throughout the past years the proposed changes, modifications or additions to existing agreements have originated either with the railroad or with the bargaining agent for the craft. These proposals have been made by either party and have been written or oral (Tr. 78, 79, 85). They have arisen during conferences between the railroad and the representative (Tr. 126). Whenever

there has been no controversy over such proposal, or when the parties have been able to work out an agreement, no notice under the Act demanding a conference within 30 days, designating the place thereof, or requesting the services of the Mediation Board, have been given either by the railroad or the representative, whether the latter has been BLE or BLF&E (Tr. 126). More agreements have been arrived at by representatives of management and employees sitting down and on verbal request of one side or the other, working the desires out, than by serving the written notice required by Section 6 of the Act (Tr. 126). When one side wants some change or new agreement and the other one won't talk about it, then the notice is served to compel the other side to negotiate (Tr. 126). While petitioners complain of the approval of the retirement age agreement by their bargaining representative at the meeting of June 27, 1954, they say nothing at all about the approval of an agreement at the same meeting with the same members present protecting their dead-head payments over a shorter route (Tr. 93).

At the time of the trial, November 29, 1954, Petitioner McMullans was 79-years-old (Tr. 58); Pate was 71-years-old (Tr. 46), and Edwards nearly 71-years-old (Tr. 61). While all three were notified of the adoption of the retirement agreement July 1, 1954 (Tr. 47, 59, 62), they were not notified that they would be retired until October 1, 1954 (Tr. 134).

On this state of facts the injunction was denied.

ARGUMENT.

I.

The Petition for a Writ of Certiorari Filed Herein Does Not Present a Case Which Would Justify the Issuance of the Writ.

Agreements negotiated between a railroad and the bargaining representative of a craft requiring the retirement of employees at age 70 have been upheld, in addition to the proceedings below, in the following cases:

Boget v. Chicago & Northwestern Railroad Co. (N. Dist., Ill.), No. 51 C902 (1951);

Goodin v. Clinchfield Railroad Co., 125 F. Supp. 441 (D. C. Tenn.), affirmed C. C. A., 6th (1956), ____ F. (2d) ____;

Lamon v. Georgia Southern & Florida Ry. Co. (Ga.), 90 S. E. 659 (1955).

Such agreements have been upheld in other industries, as in *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247, in which this Court denied certiorari, 336 U. S. 960; *United Protective Workers v. Ford Motor Co.*, 223 F. 2d 49, 50. Such a plan for compulsory retirement, although not amounting to a negotiated agreement but established by the employer and acquiesced in for many years by the bargaining representative of the craft, was upheld in *United States Steel Corp. v. Nichols*, 229 F. 2d 396.

If an agreement entered into by the bargaining representative may be set aside by individual members of the craft, the railroad could never be sure of the binding effect of any agreement. *Day v. Louisiana & N. R. Co.*, 295 Ky. 679, 175 S. W. 2d 347, 349. The railroad is entitled to deal with the bargaining representative without being required to investigate his specific authority to make such agree-

ment. *Childers v. Brotherhood of R. Trainmen*, 192 F. 2d 956, 960.

This Court, in *Ford Motor Co. v. Huffman*, 345 U. S. 330, 338, 339, has recognized the validity of agreements which result in the compulsory severance of an employee from his job. It has also approved collective bargaining on the discharge of employees in *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 360.

The decision below is not in conflict with that of another circuit, state supreme court, nor this Court.

Petitioners suggest that the writ should issue because there are a number of such agreements in force and it is possible other employees will want to contest them on the same ground petitioners have. Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *National Labor Relations Board v. Pittsburgh S. S. Co.*, 340 U. S. 498, 502.

II.

The Railroad Company and the Bargaining Representative May Enter Into a Valid Collective Bargaining Contract for the Compulsory Retirement of Members of the Craft at Age 70.

There is nothing illegal or immoral in a compulsory retirement agreement at age 70. The Railway Labor Act does not interfere with the right of an employer to discharge his employees or to create or abolish positions so long as it does not impair the collective bargaining process. *Beeler v. Chicago, R. I. & P. R. Co.*, 169 F. 2d 557, 560, 561; *Butler v. Thompson*, 192 F. 2d 831, 833. Collective bargaining agreements do not create a permanent

status, give an indefinite tenure, nor extend rights created by a contract beyond their life, when agreements have been terminated or modified in accordance with the Act. *System Federation No. 59 etc., v. Louisiana & A. Ry. Co.*, 119 F. (2d) 509.

The Act was never intended to guarantee employees the right to do as they please, but rather to insure them the right of collective bargaining. *N. L. R. B. v. Draper Corporation*, 145 F. 2d 199, 203. In creating this right of collective bargaining it was never contemplated that each and every member of the craft could or would be satisfied. *Switchmen's Union of North America, et al., v. Ogden Union Railway & Depot Co., et al.*, 209 F. 2d 419, 422; *Ford Motor Co. v. Huffman*, 345 U. S. 330, 338.

Petitioners claim this Court in *Railroad Retirement Board, et al. v. Alton Railroad Co. et al.*, 295 U. S. 330, condemned compulsory retirement in holding the first Railroad Retirement Act unconstitutional. This Court there held, page 368, that "These matters obviously lie outside the orbit of Congressional power." "This Court neither approves nor condemns any legislative policy." *U. S. v. Butler*, 297 U. S. 1, 63. Consequently, if the power was not granted to Congress, it is reserved to the states or the people. *United States v. Butler, supra; United States ex rel. Turner v. Williams*, 194 U. S. 279, 294. In fact, in a proper case Congress has provided for just such a compulsory retirement at age 70 of federal employees. 5 U. S. C. 715(a).

Nor has the right of railroad employer and employees to enter such a retirement agreement been foreclosed by the enactment of the Railroad Retirement Act, 45 U. S. C. 228(b) *et seq.* That act provides for the payment of an annuity to those who have reached the age of 65, have the other necessary qualifications, and apply for the an-

nuity. 45 U. S. C. 228b (a). Among the necessary qualifications is the requirement that "they shall have ceased to render compensated service to any person." That Act creates an annuity fund in which qualified employees may participate when employment has ceased by retirement or relinquishment of the right to continue in the service. *Boget v. Chicago & Northwestern Railway Co., supra.* It has nothing to do with collective bargaining under the Railway Labor Act.

Error in the court below is alleged arising from the application of the decision in *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247. This criticism is not justified. The *Inland Steel* case approved the compulsory retirement plan because the court was "unable to differentiate between the conceded right of a Union to bargain concerning a discharge, particularly a nondiscriminatory discharge of an employee, and its right to bargain concerning the age at which he is compelled to retire." The court noticed the difference in the language of the Railway Labor Act and National Labor Relations Act, but found "a comparison of the language" of no importance in the decision of that case. In fact, the implication of that case is that bargaining on such an agreement is necessary to keep employers from changing the retirement age at their caprice. If such an agreement is not within the terms of the Act, then the employer is free to retire the employee at will under the common law right to "hire and fire." *United States Steel Corp. v. Nichols*, 229 F. 2d 396; *Beeler v. Chicago, R. I. & P. Ry. Co.*, 169 F. 2d 557. However, the collective bargaining process under the Railway Labor Act is broader than suggested by petitioners or appellant in the *Inland Steel Case*, for it provides that such bargaining between the parties shall cover the making and maintenance "of agreements concerning rates of pay, rules and

working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise." (45 U. S. C. 152-First.)

III.

A Bargaining Representative Elected Under Provisions of Railway Labor Act Is Not Required to Give Notice to Members of the Craft and an Opportunity to be Heard Before Negotiating a Compulsory Retirement Contract Based on Age.

The lower court did not err in holding that the bargaining agent is the representative of the craft and is not required to consult with the individual members or to give them notice of contemplated contractual actions within the scope of its authority.

Petitioners rely on *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, to uphold their contention that they were entitled to notice of the contemplated contract and an opportunity to be heard. The *Steele* case is clearly distinguishable from the case at bar.

The Court had before it in the *Steele* case only the complaint that had been filed by the Negro firemen plaintiffs, and the only question posed for decision was whether the allegations of the complaint stated a cause of action against the defendant brotherhood and the carrier. The charge made by the pleading was that the brotherhood had engaged in a secret campaign of hostile discrimination against the Negro firemen, using the fact of racial distinction between Negro and white firemen as the basis or excuse for curtailing the exercise of earned seniority rights by the Negro firemen, and ultimately eliminating them entirely from the craft.

The ruling in the *Steele* decision is that because Congress has clothed the craft representative with "powers

comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents" (323 U. S. 192 at 232), the craft representative may not use those powers to discriminate in a *hostile* manner against individual employees and minority groups within the craft, and, furthermore, the power of the courts is available to protect employees from such practices.

Having found that the complaint in the *Steele* case stated a cause of action, the only question before the Court was thereby resolved, and there was no occasion for this Court to rule, nor did it purport to rule, that a notice and an opportunity for a hearing by the employees comprising a craft is a requirement imposed upon the craft representative by the Railway Labor Act. There is *obiter dictum* in the opinion written by Mr. Chief Justice Stone, to the effect that "wherever necessary" to avoid a show of hostile discrimination, notice to and hearing by the individual employees affected would be advisable or probably necessary. But even this expression of an opinion contemplates that so extreme and so burdensome a requirement as giving notice and hearing to individual employees or minority groups within the craft would be essential only when the proposed agreement restricts employment rights in a manner suggestive of *hostile* discrimination against a minority group.

The petitioners can make no valid claim that the compulsory retirement agreement discriminates in a hostile manner against them, or that the Brotherhood in seeking the retirement agreement was motivated by a hostile attitude toward the petitioners. The findings of the lower court negative any such claim. There can be no foundation for a claim of hostile discrimination when the agreement applies in a like manner to all members of the craft,

varying only in respect to its time of application to each employee. These being the circumstance, the lower court declined to hold that the law as established by the *Steele* case obliged the Brotherhood to give notice to and allow the petitioners a hearing before the compulsory retirement agreement could be made effectiveas against them. Neither did the other courts to whom his question has been presented find in the *Steele* decision what the petitioners claim to find there. *Goodin v. Clinchfield Railroad Co.*, 125 F. Supp. 441, affm'd. Feb. 10, 1956, ____ F. 2d ____; *Lamon v. Ga. Southern & Fla. Ry. Co. (Ga.)*, 90 S. E. 2d 659; *Boget v. Chicago & Northwestern Railroad Co.* (Case No. 51 C 902, N. Dist., Ill. (1951)).

Even if petitioners were correct in contending that the holding in the *Steele* case requires a craft representative to give to the individual employees within the craft notice of a proposed agreement and a chance to express their views on the proposal, the record in this case establishes that the proposed retirement agreement was the subject of common knowledge and discussion among the members of the engineers' craft for a period of two or three months before the agreement was actually consummated. The Petitioner McMullans actually called upon the president of the respondent carrier to express his disapproval of the proposed agreement. The requirement of notice and an opportunity to be heard, assuming such requirement is to be found in the Railway Labor Act, was, we submit, fulfilled in this instance by the common knowledge and discussion of the subject matter among the members of the engineer's craft and the ample opportunity the petitioners had to express their views in any way they saw fit to either or both of the contracting parties prior to the time that the parties actually consummated the retirement agreement on June 28, 1954.

CONCLUSION.

It is therefore respectfully submitted that petition for a writ of certiorari be denied.

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